

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL ADAM ASSENBERG,
Plaintiff,

v.

COMMUNITY ACTION CENTER, et al.,
Defendants.

No. CV-08-193-FVS

ORDER GRANTING SUMMARY
JUDGMENT

THIS MATTER comes before the Court without oral argument based upon the defendants' motion for summary judgment. They are represented by Michael E. McFarland. Mr. Assenberg is representing himself.

BACKGROUND

Michael Assenberg and his wife applied for federally-subsidized housing assistance. Their application was reviewed by Nancy Whitesell, the Housing Program Coordinator for the Community Action Center ("CAC"). The CAC administers the Housing Choice Voucher Program, a federally funded rental assistance program in Whitman County, on behalf of the Spokane Housing Authority and the Department of Housing and Urban Development ("HUD"). While Ms. Whitesell concedes the Assenbergs' preliminary application did not contain information regarding any medical marijuana use, she alleges that, in their final application, they indicated Mr. Assenberg intended to grow

1 and use marijuana to relieve pain and, what is more, he had been
2 evicted previously from federally-subsidized housing as a result of
3 his marijuana use. Since the CAC is funded, at least in part, by HUD,
4 and since federal regulations prohibit the CAC from providing
5 federally-funded housing assistance to a person who is engaging in the
6 illegal use of drugs, the CAC denied the Assenbergs' application. Mr.
7 Assenberg filed an action in Whitman County Superior Court alleging,
8 in essence, that he has a right to use marijuana for medical purposes
9 and the CAC violated the right by denying his application for housing
10 assistance. The defendants removed the action to federal court on the
11 ground Mr. Assenberg's claim arises under the Constitution and laws of
12 the United States. 28 U.S.C. § 1441(a),(b). Now, the defendants move
13 for summary judgment. They argue the issues Mr. Assenberg is raising
14 in this action have been decided against him in previous actions and,
15 thus, he is precluded by the doctrine of issue preclusion from
16 relitigating the issues in this action.

17 **STANDARD**

18 A motion for summary judgment must be granted "if the pleadings,
19 depositions, answers to interrogatories, and admissions on file,
20 together with the affidavits, if any, show that there is no genuine
21 issue as to any material fact and the moving party is entitled to a
22 judgment as a matter of law." Fed.R.Civ.P. 56(c). See *Celotex Corp.*
23 *v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265
24 (1986). A material fact is one "that might affect the outcome of the
25 suit under the governing law" *Anderson v. Liberty Lobby,*
26 *Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

1 A dispute regarding a material fact raises a genuine issue for trial
2 only "if the evidence is such that a reasonable jury could return a
3 verdict for the nonmoving party." *Id.* "Where the record taken as a
4 whole could not lead a rational trier of fact to find for the non-
5 moving party, there is no 'genuine issue for trial.'" *Matsushita*
6 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106
7 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (quoting *First National Bank*
8 *of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575,
9 1592, 20 L.Ed.2d 569 (1968)).

10 **ISSUE PRECLUSION**

11 A. Prior Litigation

12 During 2005, Mr. Assenberg commenced an action in state court
13 against the Anacortes Housing Authority ("AHA") alleging that the
14 AHA's violated the Fair Housing Act ("FHA"), the Americans with
15 Disabilities Act ("ADA"), the Rehabilitation Act and RCW 49.60.222.
16 The AHA removed the matter to the United States District Court for the
17 Western District of Washington. There, United States District Judge
18 Robert S. Lasnik entered summary judgment in favor of the AHA; holding
19 both that Mr. Assenberg's use of marijuana rendered him ineligible to
20 reside in federally subsidized housing, and that the AHA did not have
21 a duty to accommodate his drug use under the FHA, ADA or
22 Rehabilitation Act. In addition, Judge Lasnik rejected Mr.
23 Assenberg's medical necessity defense to the CSA because he was not
24 facing criminal prosecution. *Assenberg v. Anacortes Housing*
25 *Authority*, 2006 WL 1515603 (W.D. Wash. 2006); see also *U.S. v. Oakland*
26 *Cannabis Buyers' Co-op*, 532 U.S. 483, 494-495, 121 S. Ct. 1711, 1719-

1 1720, 47 L.Ed.2d 483 (2001) ("medical necessity is not a defense").

2 Mr. Assenberg appealed the decision. In affirming Judge Lasnik,
3 the Ninth Circuit held Mr. Assenberg's "attempt to assert the medical
4 necessity defense" was properly rejected, and that his eviction was
5 "substantiated by [his] illegal drug use." *Assenberg v. Anacortes*
6 *Housing Authority*, 268 Fed.Appx. 643, 2008 WL 598310 (9th Cir. 2008).
7 Mr. Assenberg filed a Petition for Writ of Certiorari with the United
8 States Supreme Court, which denied his petition on October 6, 2008.
9 *See Assenberg v. Anacortes Housing Authority*, --- S.Ct. ----, 2008 WL
10 2227338 (U.S. 2008). Mr. Assenberg filed another action against
11 different defendants, stemming from the same incident. Judge Lasnik
12 dismissed the action, stating that Mr. Assenberg's claim that
13 Washington's "medical marijuana law grants him an unfettered right to
14 use marijuana in federally subsidized housing" had been rejected in
15 the prior suit against the AHA and thus, he was barred by issue
16 preclusion to relitigate his claims. *Assenberg v. McCullum et al.*,
17 2006 WL 2841893, *1 (W.D. Wash. 2006).

18 During 2006, Mr. Assenberg filed a complaint in the United States
19 District Court for the Eastern District of Washington alleging his due
20 process rights were violated by the Federal Drug Administration and
21 the Department of Justice for failing to allow his use of medical
22 marijuana to alleviate his pain. *See Assenberg v. State of*
23 *Washington*, Case No. 2:06-CV-00351-RHW. United States District Judge
24 Robert W. Whaley dismissed the case, stating that "there is no
25 fundamental constitutional right to possess and use marijuana for
26 medical reason." *Id.*

1 B. Elements of Issue Preclusion

2 "The preclusive effect of a judgment is defined by claim
3 preclusion and issue preclusion, which are collectively referred to as
4 'res judicata.'" *Taylor v. Sturgell*, --- U.S. ----, ----, 128 S.Ct.
5 2161, 2171, 171 L.Ed.2d 155 (2008). In the Ninth Circuit, the
6 relitigation of issues adjudicated in a prior proceeding is barred by
7 the doctrine of issue preclusion if the following requirements are
8 met:

9 (1) there was a full and fair opportunity to litigate the
10 issue in the previous action; (2) the issue was actually
11 litigated in that action; (3) the issue was lost as a result
12 of a final judgment in that action; and (4) the person
13 against whom collateral estoppel is asserted in the present
action was a party or in privity with a party in the
previous action.

14 *Kendall v. Visa U.S.A., Inc.* 518 F.3d 1042, 1050 (9th Cir.2008)
15 (citing *United States Internal Revenue Serv. v. Palmer (In re Palmer)*,
16 207 F.3d 566, 568 (9th Cir.2000)). Issue preclusion is designed to
17 protect parties from successive litigation and promote judicial
18 economy, *Maciel v. C.I.R.*, 489 F.3d 1018, 1023 (9th Cir. 2007).
19 Defensive issue preclusion is used by a defendant attempting to
20 prevent a plaintiff from asserting an issue already litigated and lost
21 against a different defendant. *Masson v. New Yorker Magazine, Inc.*,
22 85 F.3d 1394, 1400 (9th Cir.1996).

23 *1. Full and Fair Opportunity*

24 Issue preclusion is only appropriate if the parties have had a
25 full and fair opportunity to litigate the issue. *Littlejohn v. U.S.*,
26 321 F.3d 915, 923 (9th Cir. 2003). Two considerations are relevant in

1 determining whether a party received a full and fair opportunity to
2 litigate. First, if the procedures used in the first and second
3 actions vary enough to raise the potential for a different result,
4 issue preclusion is inappropriate. *Maciel v. C.I.R.*, 489 F.3d 1018,
5 1023 (9th Cir.2007). Second, if the party's motivation differed in
6 the two actions, whereby an issue in the first action did not need to
7 be contested significantly, issue preclusion should not prevent the
8 litigation of that issue in a subsequent action. *Id.*

9 The present matter involves actions which are virtually identical
10 in terms of procedure and any difference would not be sufficient
11 enough to create the risk of a different result. It also appears that
12 while Mr. Assenberg may argue the issues he raises differ from his
13 prior actions, the motivation underlying the proceedings is the same.
14 In addition, there is nothing to indicate that Mr. Assenberg failed to
15 contest an issue previously that is being raised in this action.
16 Although Mr. Assenberg has not had the opportunity to present his case
17 to a jury, this does not affect whether or not the issues should be
18 prevented from relitigation under claim preclusion.

19 *2. Issue actually litigated*

20 If there is any question as to whether an issue has been
21 litigated, issue preclusion should not be applied. *Davis & Cox v.*
22 *Summa Corp.*, 751 F.2d 1507, 1518 (9th Cir.1985). Further, if a
23 decision could be made using grounds other than the issue in question,
24 issue preclusion should not bar relitigation of that issue. *Eureka*
25 *Federal Sav. and Loan Ass'n v. American Cas. Co. of Reading, Pa.*, 873
26 F.2d 229, 233 (9th Cir. 1989). "In determining whether issue was

1 actually litigated and determined in earlier adjudication, . . . [a]
2 court is allowed to draw necessary inferences from prior adjudication
3 in order to determine whether issue was actually decided." *Disimone*
4 *v. Browner*, 121 F.3d 1262 (9th Cir. 1997) (internal punctuation and
5 citation omitted). *See also Kamilche Co. v. U.S.*, 53 F.3d 1059, 1062
6 (9th Cir. 1995) (holding that when the same contention was made, which
7 required the same argument and evidence to prove, issue preclusion
8 barred litigation of the second issue); *Steen v. John Hancock Mut.*
9 *Life Ins. Co.*, 106 F.3d 904, 913 (9th Cir. 1997) (noting that
10 initiating a motion which led to a court's decision in a previous case
11 "received 'actual, full, and fair litigation' of the issue . . .").

12 The assertions made in this and matter and previous cases, have
13 centered on Mr. Assenberg's use of marijuana being legal under
14 Washington law. In the current matter, Mr. Assenberg, his use of
15 marijuana is doctor-approved, which satisfies the recognized medical
16 use requirement of the CSA. This substantially overlaps with
17 assertions made in the prior actions discussed above. Mr. Assenberg
18 also asserts that the current matter presents a state issue that has
19 not yet been brought before the Court. Although Mr. Assenberg
20 stresses that these two claims were made in different contexts because
21 they were asserted against different housing organizations, this is
22 ineffective in defeating claim preclusion. If claim preclusion could
23 be so easily avoided, a party could effectively encase claims for use
24 in later actions, as long as the context was different.

25 Mr. Assenberg also maintains that issue preclusion does not bar
26 his claim specifically relating to the CSA because he did not address

1 the same clauses of the CSA in his prior cases. However, the
2 underlying issue Mr. Assenberg is pursuing is that his marijuana use
3 is not violative of the CSA and, thus, he cannot be prevented from
4 receiving federally-funded housing assistance. This is the same issue
5 he has litigated previously.

6 *3. Issue lost as result of final judgment on merits*

7 Issue preclusion also requires that the issue was lost as a
8 result of a final judgment in the previous action. In *Diruzza v.*
9 *County of Tehama*, 323 F.3d 1147, 1156 (9th Cir. 2003), the court
10 stated that when a trial court's decision has been affirmed, that
11 judgment may be used to invoke issue preclusion in subsequent matters.
12 An issue decided and lost on a motion for summary judgment or judgment
13 on the pleadings satisfies this requirement. *Steen v. John Hancock*
14 *Mut. Life Ins. Co.*, 106 F.3d 904, 912 (9th Cir. 1997) (citing
15 Restatement (Second) of Judgments § 27 cmt. d).

16 The entry of summary judgment by Judge Lasnik suffices as final
17 judgment on the merits. The judgment set forth that Mr. Assenberg's
18 use of marijuana had rendered him ineligible to reside in federally
19 subsidized housing and that his medical necessity defense to the CSA
20 failed because he was not facing criminal prosecution. This decision
21 was then affirmed by the Ninth Circuit. As the marijuana use issue
22 addressed and ruled upon in this prior matter is the same issue being
23 asserted in the current case, that issue can be considered to be lost
24 as the result of a final judgment.

25 *4. Person against whom issue preclusion is asserted*

26 Finally, to apply, the party against whom issue preclusion is

1 being asserted must have been a party or in privity with a party in
2 the first action. *In re Reynoso*, 477 F.3d 1117, 1122 (9th Cir. 2007).
3 This requirement is easily met given Mr. Assenberg's role as the
4 plaintiff in the prior actions.

5 **CONCLUSION**

6 The defendants denied Mr. Assenberg's application for federally-
7 funded rental assistance based upon his stated intention to grow and
8 use marijuana to relieve pain while receiving assistance. Pursuant to
9 the doctrine of issue preclusion, Mr. Assenberg may not challenge the
10 defendants' decision on the ground he has a Constitutional or
11 statutory right to grow and use marijuana for medical purposes while
12 receiving federally-funded rental assistance.

13 **IT IS HEREBY ORDERED:**

14 The defendants' motion for summary judgment (**Ct. Rec. 30**) is
15 granted. Mr. Assenberg's claims are dismissed with prejudice.

16 **IT IS SO ORDERED.** The District Court Executive is hereby
17 directed to file this order, enter judgment accordingly, furnish
18 copies to the plaintiff and to counsel for the defendants, and close
19 the case.

20 **DATED** this 26th day of November, 2008.

21 s/Fred Van Sickle
22 Fred Van Sickle
23 Senior United States District Judge
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